

NO. 41450-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL ANTHONY FONTENOT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Elizabeth P. Martin, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The State's failure to provide appellant notice of the allegation on which his Special Sex Offender Sentencing Alternative was revoked denied appellant due process.

Issue pertaining to assignment of error

The State sought revocation of appellant's SSOSA based on its allegation of specific violations of treatment and community custody conditions. The State argued at the revocation hearing, however, and the court found that appellant had failed to make satisfactory progress in treatment. Where appellant received no notice that he faced revocation on this basis, was he denied due process?

B. STATEMENT OF THE CASE

In May 2006, Michael Fontenot pleaded guilty to two counts of rape of a child in the second degree. CP 9-22. The court imposed a sentence of 131 months to life but suspended 125 months under the Special Sex Offender Treatment Alternative. CP 29; RCW 9.94A.670. Under the terms of his SSOSA, Fontenot served six months in confinement then commenced sex offender treatment with Jeanglee Tracer. CP 29; RP¹ 14.

¹ The Verbatim Report of Proceedings from 10/26/10 is contained in a single volume, designated RP.

Early in his treatment program Fontenot twice stipulated to violations of his treatment and community custody conditions and was sentenced to confinement. CP 41-42, 45-46. Both incidents involved establishing relationships with women not previously approved by his treatment provider or CCO. RP 24-25. After each period of confinement Fontenot returned to his treatment group and continued to work on his program. RP 14.

In December 2009, Fontenot reconnected with an old friend, Pamela Morse. Fontenot told his treatment group that he was interested in pursuing a romantic relationship with Morse, but because Morse had a six year old daughter, the group advised Fontenot that he could not be in a relationship with her. RP 15, 18-19. Fontenot continued to work with Morse in his business and, against the advice of his treatment group, after several months he started spending time with her socially as well. Morse and Fontenot had one sexual encounter in May or June 2010. CP 55-56.

Fontenot completed treatment in June 2010, and he was successfully discharged at a SSOSA review hearing on July 9, 2010. RP 14, 56. Fontenot's CCO filed a violation notice on July 22, 2010, seeking revocation of Fontenot's SSOSA based on allegations that he had contact with a minor on July 11, 2010, July 15, 2010, and September 30, 2009. CP 51.

Fontenot took a polygraph in August 2010, and he described the nature of his relationship with Morse and his contacts with Morse's daughter M.M. CP 55-56. At a revocation hearing before the Honorable Elizabeth Martin on October 26, 2010, Fontenot adopted the statements he had made during the polygraph, stipulating to contact on three specific dates that formed the basis for the CCO's alleged violations. RP 6.

First, he had contact with Morse and M.M. on July 11, 2010, when they walked out of church as a group and then got into separate vehicles. He had further contact on July 15, when Morse accompanied him to Seattle to place a bid on a job, and M.M. was with them. After their business was concluded they went to the pier, ate dinner at Red Robin, and went on a cruise. Finally, Fontenot stipulated that he had incidental contact with a minor on September 30, 2009, at a mall. RP 6-7.

In addition, Fontenot stipulated that he had a sexual encounter with Morse about two months before the August polygraph, and that he did not seek prior approval of his relationship from his CCO or his treatment provider. RP 7-8. He further admitted that he had had proximity contact with M.M. five to ten times over the course of his relationship with Morse, but he denied ever touching her, and there were no allegations that he was sexually inappropriate. RP 8-9.

Tracer testified at the hearing that she would accept Fontenot back into treatment, on the condition that he participate in quarterly polygraphs. RP 15-16. She acknowledged Fontenot's violations, but she had seen significant changes in Fontenot during the course of treatment, and she did not feel he was at risk of re-offending. Tracer recommended an additional year of treatment, rather than revocation. RP 15-16.

On cross examination, Tracer testified that Fontenot never disclosed his sexual encounter with Morse, which was a violation of treatment and community custody conditions. RP 20. His contact with M.M. was also a violation of his conditions. RP 21.

Tracer agreed with the prosecutor that the success of treatment depends on honesty, with no lies, omissions, or commissions of deception. RP 23. The prosecutor then asked Tracer about the relapse prevention plan Fontenot had prepared during treatment. She explained that in the plan Fontenot identified his delusions and thinking errors which led him to take advantage of an available victim in the past. RP 28-30. The prosecutor suggested that M.M. was available to Fontenot in a similar way, because Fontenot had not been honest with Tracer about his relationship with Morse. RP 30-32. Tracer agreed that she could not have prevented the relationship with Morse because Fontenot had not been honest about it while in treatment. RP 32.

The court then asked further questions about the relapse prevention plan. Tracer explained that it was Fontenot's last assignment in treatment, designed to identify triggers, thinking errors, and Fontenot's offense cycle so that he can intervene in the future if those things reoccur. RP 36-37. Tracer testified that Fontenot obviously had not followed through with his plan, and he needed to figure out where the plan failed and make it better. RP 38. Upon further questioning by the prosecutor, Tracer agreed that part of Fontenot's relapse prevention plan was to remove himself from situations that were part of the problem, but Fontenot had not removed himself from the situation with Morse for several months. RP 39. Tracer stood by her willingness to work with Fontenot, explaining that the relapse prevention plan is a work in progress. RP 34, 36, 38.

Following Tracer's testimony, the prosecutor argued that the court should revoke Fontenot's SSOSA. Fontenot was prohibited from having contact with minors, and he was required to inform his CCO and treatment provider of any romantic relationships. The prosecutor noted that Fontenot stipulated to multiple violations of these conditions, and he should not be given another chance to remain in the community. RP 44-46. The prosecutor further argued that Fontenot's relapse prevention plan did not work, because within a couple of weeks of completing it he started pursuing a relationship with Morse. RP 50. She argued that Fontenot was a

high-risk offender who was not safe to be in the community and asked the court to impose the remainder of his sentence. RP 50-51.

Defense counsel acknowledged Fontenot's violations. RP 52-53. Noting that while his choices with adults were questionable, Fontenot had never put himself in a position where he was alone with a child or a child was endangered. Counsel asked the court to give Fontenot another chance. RP 54.

The court expressed concern that Fontenot had been in court for the official conclusion of his treatment in July, yet he committed a violation just two days later. RP 56. The prosecutor responded that Fontenot was deceitful with the court at that hearing, as well as with his treatment provider and CCO, because he was in an undisclosed relationship with Morse at the time. RP 59.

The court noted that the decision whether to revoke Fontenot's SSOSA was not an easy one, but Fontenot had been given two prior chances and had admitted the current violations. RP 63. The court stated that it found Tracer's willingness to work with Fontenot compelling, but it was reluctantly revoking Fontenot's SSOSA. RP 63. It explained that when Fontenot was in court on July 9, 2010, and his CCO reported that he was in full compliance, Fontenot knew he was not in compliance, and he continued his noncompliance within days of that hearing. RP 64.

Fontenot had completed therapy, and he knew the rules. He knew or should have known about his triggers and how to avoid relapse, yet he was not avoiding it. RP 64. The court said it could not take the chance of waiting for sexual contact with a minor to occur before revoking Fontenot's SSOSA. RP 64.

The court entered an order revoking Fontenot's SSOSA and committing him to the Department of Corrections for 125 months to life, the remainder of his sentence. CP 106-08. Fontenot filed this timely appeal. CP 109.

C. ARGUMENT

THE STATE'S FAILURE TO INFORM COLLINS OF ALL THE ALLEGATIONS ON WHICH IT RELIED IN SEEKING REVOCATION VIOLATED FONTENOT'S RIGHT TO DUE PROCESS.

An offender's SSOSA may be revoked at any time if a court is reasonably satisfied that the offender has violated a condition of his suspended sentence or failed to make satisfactory progress in treatment. RCW 9.94A.670(11)²; State v. Dahl, 139 Wn.2d 678, 990 P.2d 396 (1999). The revocation of a suspended sentence is not a criminal proceeding, and the offender does not have the same due process rights as

² Former RCW 9.94A.670(10), in effect at the time of Fontenot's offenses, has been renumbered but is substantively unchanged in the current version, effective August 1, 2009.

afforded at the time of trial. Dahl, 139 Wn.2d at 638. Nonetheless, an offender facing revocation is entitled to minimal due process rights, including

(a) written notice of the claimed violations; (b) disclosure to the parolee of the evidence against him; (c) the opportunity to be heard; (d) the right to confront and cross-examine witnesses (unless there is good cause for not allowing confrontation); (e) a neutral and detached hearing body; and (f) a statement by the court as to the evidence relied upon and the reasons for the revocation.

Dahl, 139 Wn.2d at 683 (citing Morrissey v. Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972)).

“Due process requires that the State inform the offender of the specific violations alleged and the facts that the State will rely on to prove those violations.” Dahl, 139 Wn.2d at 685. In Dahl, the State sought revocation of Dahl’s SSOSA, alleging he failed to make reasonable progress in treatment. Treatment notes provided to Dahl included descriptions of two incidents, which the court relied on in finding he had failed to make reasonable progress in treatment and revoking his suspended sentence. Dahl, 139 Wn.2d at 683.

On appeal Dahl argued that his right to minimal due process was violated because the State did not allege the incidents as separate violations. Dahl, 19 Wn.2d at 683-84. The Supreme Court disagreed. It noted that the two incidents were not raised as separate SSOSA violations

but rather as evidence of Dahl's failure to make progress in treatment. Dahl, 139 Wn.2d at 684. Due process was satisfied because Dahl had notice of that alleged violation and the facts the State would rely on to prove it. Dahl, 139 Wn.2d at 685.

The issue presented here is the inverse of that in Dahl. Here, the State sought revocation of Fontenot's SSOSA based on allegations of specific violations of treatment and community custody conditions, to which Fontenot stipulated. The State then relied on those violations as evidence that Fontenot's relapse prevention plan was not working and thus he failed to make satisfactory progress in treatment. RP 27-32, 39-40, 50. Unlike in Dahl, however, the State gave no notice of its contention that Fontenot had failed to make satisfactory progress in treatment. See CP 51. This lack of notice violated due process.

The court was clearly persuaded by the prosecutor's argument that Fontenot's treatment had failed. While it acknowledged the uncontested violations, the court's oral ruling demonstrates that it was relying on the perceived failure of Fontenot to make satisfactory progress in treatment when revoking his SSOSA. RP 63-64.

First, the State argued and the court relied on the fact that Fontenot was deceitful when he was in court for his last review hearing. Although the court found Tracer's willingness to continue treating Fontenot

compelling, it was persuaded to revoke in part because Fontenot knew he was not in compliance at the time the CCO reported to the court that he was. RP 64. As the State established through cross examination of Tracer, honesty was essential to the success of treatment, and the court's reliance on Fontenot's deception indicates it was revoking because Fontenot did not make satisfactory progress in treatment. RP 23, 64.

The court went on to say that Fontenot continued his noncompliance within days of that hearing, despite the fact that he had completed treatment and knew the rules. RP 64. The court stated that Fontenot knew or should have known about triggers and how to avoid relapse, yet he was not avoiding it. RP 64. The court was unwilling to take the chance that Fontenot's failure to succeed in treatment would lead him to re-offend, and it revoked Fontenot's SSOSA. RP 64. Because Fontenot had no notice that his SSOSA would be revoked on the basis of his failure to make satisfactory progress in treatment, he was denied due process, and the revocation order must be reversed. See Dahl, 139 Wn.2d at 689 (due process error not harmless where it affected court's decision to revoke).

D. CONCLUSION

Fontenot did not receive notice of all the allegations the State relied on in seeking revocation of his suspended sentence. Because

Fontenot was denied due process, this Court must reverse the revocation of his SSOSA and remand for a new hearing.

DATED this 22nd day of March, 2011.

Respectfully submitted,

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